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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

E.K. WADE,

Plaintiff,

v.

ELAINE CHAO, SECRETARY OF
LABOR, ET AL.

Defendant.

) Consolidated Cases

) No. C 08-00001 JSW

) No. C 08-00021 JSW

) **THE FEDERAL DEFENDANT'S**
) **OPPOSITION TO PLAINTIFF'S**
) **REQUEST OF ENTRY OF DEFAULT**

INTRODUCTION

On April 8, 2008, Plaintiff E.K. Wade ("Plaintiff") filed a Request for Entry of Default against defendant Elaine Chao Secretary of the Department of Labor ("Federal Defendant"). Plaintiff claims that he is entitled to entry of default because the Federal Defendant has not filed an answer with respect to his complaint asserted against her. However, the Federal Defendant timely moved to dismiss certain claims in Plaintiff's complaint; therefore, Plaintiff is not entitled to entry of default.

STATEMENT OF RELEVANT FACTS

On February 22, 2008, the parties entered into a Joint Stipulation to Consolidate the Cases and Extend the Time for the Federal Defendants to File A Responsive Pleading ("Stipulation"). Per the Stipulation, the Federal Defendants were to file a responsive pleading by March 19, 2008. On March 19, 2008 the Federal Defendants filed a motion to dismiss, *inter*

1 *alia*, the Seventh and Eighth causes of action in complaint C-08-00021 JSW (“Motion to
 2 Dismiss”). The Federal Defendant’s Reply in support of its Motion to Dismiss is due on April
 3 11, 2008, and the hearing on the Motion to Dismiss is scheduled for May 9, 2008.

4 ANALYSIS

5 Pursuant to Rule 12 of the Federal Rules of Civil Procedure, a defendant may move to
 6 dismiss or answer in response to a complaint. Fed. R. Civ. P. 12 *et seq.* Further, pursuant to Rule
 7 12(a)(4)(A) of the Federal Rules of Civil Procedure, the defendant has ten days from the denial
 8 of a motion to dismiss to file a responsive pleading and or to answer a complaint. Fed. R. Civ. P.
 9 12(a)(4)(A). This is true even if the defendant only moves to dismiss certain causes of action as
 10 opposed to the entire complaint, as was done in the instant case. See e.g., I-Enterprise Co. LLC
 11 v. Draper Fisher Jurvetson Management Co., Civ. No 03-1561 MMC, 2005 WL 3590984 (N.D.
 12 Cal. Dec. 30 2005) at * 2. In I-Enterprise, the defendants did not file an answer, but rather filed
 13 a motion to dismiss certain causes of action alleged in the Third Amended Complaint. The court
 14 found that pursuant to Rule 12(a)(4)(A) of the Federal Rules of Civil Procedure, when a motion
 15 to dismiss has been filed, the defendant is not required to answer the complaint until ten days
 16 after the Court rules on the motion. Id. at *2.

17 Because the Court has not yet issued a ruling on the Federal Defendants’ Motion to
 18 Dismiss, no answer or other responsive pleading is yet due.

19 CONCLUSION

20 For the foregoing reasons, the Plaintiff’s Request for Entry of Default should be denied.

21 Respectfully submitted,

22 JOSEPH P. RUSSONIELLO
 23 United States Attorney

24 /s/

25 Dated: April 9, 2008

26 MELISSA K. BROWN
 27 Assistant United States Attorney
 28

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she is causing a copy of the following:

THE FEDERAL DEFENDANT'S OPPOSITION TO PLAINTIFF'S REQUEST OF ENTRY OF DEFAULT

to be served this date upon the party in this action by placing a true copy thereof in a sealed envelope, and served as follows:

☒ **FIRST CLASS MAIL** by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

☐ **PERSONAL SERVICE (BY MESSENGER)**

☐ **FEDERAL EXPRESS**

☐ **FACSIMILE (FAX)** Telephone No.: See Below

to the party(ies) addressed as follows:

E.K. Wade 542 North Civic Drive, Apt. D Walnut Creek, CA 94597		
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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 9, 2008 at San Francisco, California.

/S/
MANIK BOWIE
Legal Assistant